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COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MEIKEL JEROME COOPER et al., Defendants and Appellants.	D058080 (Super. Ct. No. RIF135518)

APPEALS from judgments of the Superior Court of Riverside County, Jeffrey J. Prevost, Judge. Judgments affirmed as modified.

Defendants Meikel Jerome Cooper and Eric Glenn Little engaged in a gun battle against defendant Obadiah Baldwin and Baldwin's cohorts that resulted in the death of Baldwin's friend, Carey Mercer. A jury found Little, Cooper and Baldwin guilty of first degree murder, second degree murder, and voluntary manslaughter, respectively. The jury convicted Cooper of attempted voluntary manslaughter of Baldwin, Cooper and Little of discharging a firearm from their vehicle, and Baldwin of public fighting and assaulting Cooper and Little with a firearm.

Baldwin contends he was denied due process by a late amendment to the information. Baldwin and Little challenge the sufficiency of the evidence supporting some of their convictions. Baldwin and Cooper challenge some of the jury instructions, and all three defendants assert the trial court committed sentencing errors by failing to stay some sentences under Penal Code section 654, in pronouncing sentence, or by failing to award custody credits. (Undesignated statutory references are to the Penal Code.)

As discussed in detail below, the trial court erred when it: (1) failed to stay the consecutive terms imposed for Cooper and Little's conviction for discharging a firearm at a vehicle (count 3) under section 654; (2) declined to award custody credits to Cooper and Little; and (3) pronounced Cooper's sentence on the section 12022.53, subdivision (c) enhancement attached to his second degree murder conviction (count 1). The court clerk also erroneously recorded the court's pronouncement of sentence for Baldwin on count 5, misdemeanor public fighting. Accordingly, we order that the minutes and abstracts of judgment be corrected. As so modified, the judgments are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of March 9, 2007, Cooper and his friends, Little and Kevork Nenejian, were at a gas station on the corner of Tyler Street and Magnolia Avenue in Riverside with about 30 other people. Baldwin, an African-American, was also at the gas station with a tall man in a white hat named Bradley McFrasier. Little and Cooper are Caucasian. Cooper shared some marijuana with Baldwin, and the men exchanged cell phone numbers. Cooper then agreed to race the Chrysler he drove against a Mercedes driven by Baldwin for a $100 wager.

Cooper won the race. When the cars returned to the gas station, McFrasier jumped out of the Mercedes and approached Cooper with a gun. Cooper and Nenejian ran away while Little stayed inside the Chrysler. Little picked up Cooper and Nenejian, then dropped Nenejian off at his home. Nenejian described Little as being "mad and angry" because they had been chased by "Black people."

At about 3:00 a.m., Baldwin called Cooper to apologize for McFrasier's actions and arrange to pay the wager. Cooper testified that Baldwin identified himself as the driver of the Mercedes, and asked him three or four times whether he had called the police. Cooper stated that Baldwin proposed they meet because he "wanted to make everything, um -- everything cool between us and have no problems" and that Baldwin "seemed like a pretty nice guy." Baldwin agreed with Cooper's suggestion to meet at a particular park. Cooper had been to the park before, was familiar with its layout, and knew it had only one entrance.

Cooper claimed that he "trusted" Baldwin, was not afraid of him, and that Baldwin never threatened him or challenged him to a fight. Nevertheless, before driving to the park, Cooper and Little switched cars to a Nissan Armada. Cooper armed himself with a .45 caliber handgun, and Little armed himself with a 12-gauge shotgun that belonged to Cooper. Cooper claimed that he took the guns for his "protection" because someone had just pulled a gun on him. Cooper denied any intent to use the gun, but admitted thinking about using it for his own protection.

Baldwin also made preparations before the meeting. He exchanged his Mercedes for a Dodge Magnum. He met his friend, Carey Mercer, and they picked up Derrell

Dosty. Baldwin armed himself with a 9 millimeter semiautomatic handgun, and Dosty had a 12-gauge shotgun. Baldwin and Dosty drove to the park in the Dodge Magnum. Mercer drove to the park in a white Mustang, and had a loaded gun in his trunk. Baldwin testified that he went to the park without the intent to fight; rather, he wanted to pay his racing debt to Cooper. Neither Cooper nor Baldwin told the other about changing vehicles or bringing additional people.

Cooper arrived at the park first. Although the fog was heavy, he saw that no one else was there. He backed up onto a grassy area facing the entrance so that he could get away quickly. He turned off his engine and headlights, called Baldwin to let him know he was at the park, and waited with the loaded .45 in his lap. Cooper observed a Dodge Magnum park in the parking lot, and a white Mustang park on the street in front of the entrance, blocking the driveway.

What happened next is disputed. Cooper testified that a large African-American man stepped out of the Dodge Magnum and looked around the park. Cooper then panicked when he saw the Mustang blocking the entrance because he felt trapped. He started the Nissan, causing its headlights to turn on automatically. Cooper claimed that he heard shots and saw muzzle flashes from both the Dodge Magnum and the Mustang. Cooper put his car in drive, and started firing to "lay cover" because he wanted to "get out of there as quick[ly] as possible." He also heard Little firing the shotgun. Cooper claimed that he had been ambushed and acted in self-defense.

Baldwin was not familiar with the area and missed the entrance to the park because of the thick fog. Baldwin testified that he did not see another vehicle when he

got to the park; however, it was so foggy that another car might have been there without him seeing it. As he picked up his phone to call Cooper, Baldwin claimed that he heard shots coming from the park. Both he and Dosty ducked. Baldwin then fired his weapon in the direction of the park, and saw a sport utility vehicle drive away. When Baldwin learned that Mercer had been hit, he and Dosty put Mercer into the back of the Dodge Magnum and took him to the hospital. He and Dosty then left because Dosty had warrants for his arrest. Baldwin testified that after the shooting, Cooper called him and said, "How do you like that, nigger?"

Mercer died from a gunshot wound to his back, likely caused by a shotgun. Mercer's Mustang had bullet holes, cardboard end caps from shotgun shells inside the car, and a loaded weapon in the trunk. Baldwin's Dodge Magnum had bullet holes, bullets, and spent cartridge casings from a 9 millimeter handgun. The Nissan driven by Cooper had a spent .45 caliber cartridge casing inside, but no bullet holes.

The District Attorney charged Cooper, Little and Baldwin with first degree murder (count 1). The count included firearm enhancements as to each defendant, and further alleged that Cooper and Little intentionally killed Mercer while lying in wait. Cooper and Little were also charged with attempting to murder Baldwin (count 2), and discharging a firearm at a vehicle (count 3). Each count had various enhancements. Finally, Baldwin was charged with attempting to assault Mercer with a firearm (count 4), and misdemeanor fighting in a public place, or challenging another person in a public place to fight (count 5). The trial court later amended count 4 to allege assault with a firearm against Cooper and Little.

On count 1, the jury found Little guilty of first degree murder, and Cooper guilty of second degree murder. It found true the attached firearm allegations for both defendants, but found not true the special circumstance allegations that Little and Cooper committed the murder by lying in wait. The jury convicted Baldwin of the lesser included offense of voluntary manslaughter, and found true the allegation that he personally and intentionally discharged a firearm.

The jury acquitted Little on count 2, but found Cooper guilty of the lesser included offense of attempted voluntary manslaughter of Baldwin. It also found true the allegation that Cooper personally and intentionally discharged a firearm. The jury found Little and Cooper guilty of discharging a firearm at a vehicle (count 3), and found true the related firearm allegations. The jury convicted Baldwin of assault with a firearm on Cooper and Little (count 4), and unlawful public fighting or challenging another person to fight in public (count 5).

Little and Cooper received total prison terms of 50 years to life, and 42 years to life in prison, respectively. Baldwin received a total prison term of ten years. Defendants timely appealed.

DISCUSSION

I. *Amendment of Information*

Count 4 of the information charged Baldwin with attempting to assault Mercer with a firearm. After the close of evidence, the court suggested to the prosecutor that this count should be amended to change the victim from Mercer to co-defendants Cooper and Little. Over Baldwin's objection, the trial court amended the information to allege that

Baldwin assaulted Cooper and Little with a firearm. The jury found Baldwin guilty of the charge.

Baldwin asserts that his conviction on count 4 must be reversed because no evidence of the charge was presented at the preliminary hearing in violation of section 1009 and his right to due process. We disagree.

The court in which an action is pending may "at any stage of the proceedings" permit amendment of an information "unless the substantial rights of the defendant would be prejudiced thereby." (§ 1009.) The inquiry is "'whether or not the amendment changes the offense charged to one not shown by the evidence taken at the preliminary examination.'" (*People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754, 764, quoting *People v. Spencer* (1972) 22 Cal.App.3d 786, 799.) "[A]mendment to an information so as to add another offense shown by the evidence at the preliminary hearing has been held not to violate a defendant's constitutional rights." (*People v. Flowers* (1971) 14 Cal.App.3d 1017, 1020.)

"The evidentiary showing required for a preliminary hearing is not substantial. A defendant may be held to answer 'if there is some rational ground for assuming the possibility that an offense has been committed and that the accused is guilty of it . . . Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information.'" (*People v. Superior Court* (*Lujan*) (1999) 73 Cal.App.4th 1123, 1127.) A decision permitting amendment is a matter within the sound discretion of the trial court, and its ruling will not be disturbed absent a clear abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

At the preliminary hearing, the prosecution presented evidence about the car race between Cooper and Baldwin, Little's presence with Cooper, the altercation after the race, the telephone calls between Cooper and Baldwin wherein they agreed to meet at a park, and Cooper and Little's involvement in the shooting at the park. Mercer's statements to a detective before he died placed him and Baldwin at a park before the shooting. Hospital surveillance footage revealed that Baldwin was one of the individuals who took Mercer to the hospital. Inside Baldwin's Dodge Magnum, the police found gunshot residue and two 9 millimeter shell casings. The police also observed that the Dodge Magnum had sustained damage from bullet holes.

This evidence connected Cooper and Baldwin, established a motive for the shooting at the park, placed Cooper and Little at the park, and placed Mercer and Baldwin together at a park. The evidence further established that Baldwin owned the Dodge Magnum, and that someone inside that vehicle had fired a 9 millimeter weapon. From this evidence, one can reasonably infer that Baldwin and Mercer were at the same park as Cooper and Little, that Baldwin had been inside the Dodge Magnum at the park, and that he shot at Cooper and Little because of the race and the altercation that occurred immediately after the race. Baldwin argues that the lack of bullet holes in the car driven by Cooper supports an inference that Cooper and Little were not in the area when he began shooting. While this is certainly one inference, an alternative inference is that Baldwin shot at the car, but missed. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1171 [independent proof that a crime has been committed is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible].)

Accordingly, the trial court did not abuse its discretion in allowing the amendment because there was sufficient evidence introduced at the preliminary hearing to permit a legitimate inference that Baldwin assaulted Cooper and Little with a firearm.

II. *Sufficiency of the Evidence*

A. Legal Principles

When a defendant challenges the sufficiency of the evidence to support his conviction, we examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.) We may not reweigh the evidence, reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 884.) Additionally, we may reject the testimony of a witness who was apparently believed by the trier of fact only if that testimony is inherently improbable or impossible of belief. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict," we will affirm. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) "The question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the elements of the underlying enhancement beyond a reasonable doubt. [Citations.]" (*People v.*

Alvarez (1996) 14 Cal.4th 155, 225.) If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) The same standard of review applies even "when the conviction rests primarily on circumstantial evidence." (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1053.)

B. Little's Murder Conviction

Little contends insufficient evidence supported his first degree murder conviction under either of the prosecution's theories that he committed willful, deliberate and premeditated murder, or murder by drive-by shooting because the prosecution failed to show an intent to kill. We conclude that the evidence supports Little's first degree murder conviction based upon the theory of murder by drive-by shooting. Accordingly, we need not address the alternative theories presented to the jury.

"[A]ny murder which is perpetrated by means of discharging a firearm from a motor vehicle, *intentionally at another person outside of the vehicle with the intent to inflict death*, is murder of the first degree." (§ 189, italics added.) Thus, proof of a specific intent to kill (express malice) is required to prove first degree murder on this theory. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386; § 188 [Malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."].) Premeditation and deliberation need not be proven for first degree murder by a drive-by shooting. (*People v. Sanchez* (2001) 26 Cal.4th 834, 849, 851, fn. 10, 853, fn. 11.) Rather, the murder "could be the product of sudden and spontaneous

rage, occurring without premeditation and not occurring in connection with the commission (or attempt to commit) any felony." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 165.)

Based on the evidence presented at trial, a reasonable jury could have found that Little harbored an intent to kill when he fired at the Mustang. Little expressed anger toward Baldwin and Baldwin's friend after the race. Although Nenejian opted to go home after the encounter, Little decided to accompany Cooper to the park and armed himself with a loaded shotgun. The Mustang and the Dodge Magnum arrived at the same time, with the Mustang blocking the entrance to the park. Little knew the Mustang was occupied when he fired at it because he saw Mercer park it shortly before the shooting started, and there was no evidence presented at trial that Mercer ever left the Mustang. Finally, although Little could have fired toward the ground or into the air, he chose to fire multiple shots into the Mustang as Cooper drove by it. The driver's side window of the Mustang was shattered during the incident. It had numerous large and small caliber bullet holes exclusively on the driver's side of the car, including two "shotgun caliber" holes in the driver's side door and one in the left front quarter panel.

This is sufficient circumstantial evidence of an intent to kill. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1244 [after ascertaining vehicle was occupied, defendant sprayed it with bullets from close range indicating intent to kill everyone inside]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224-1225 [evidence that defendant directed multiple shots at truck, including two at driver's side door, provided circumstantial evidence of intent to kill].) Little's argument that he did not know Mercer, and could not

have intended to kill him, has no merit as the defendant need only have "'acted with the intent to kill the person at whom he or she was shooting.'" (*People v. Sanchez*, *supra*, 26 Cal.4th at p. 853, fn. 11.) Thus, the evidence, viewed in the light most favorable to the judgment, is sufficient to support the first degree murder conviction.

C. Baldwin's Voluntary Manslaughter Conviction

Baldwin contends the evidence does not support his voluntary manslaughter conviction on the theory he aided and abetted Cooper in target offenses of public fighting and brandishing a firearm which, under the natural and probable consequences doctrine, resulted in Mercer's death. We disagree.

As a threshold matter, we reject Baldwin's argument that use of the natural and probable consequences doctrine to convict him of Cooper and Little's crimes is "legally invalid." There is no suggestion in the record that Baldwin challenged the validity of this theory below. Additionally, he raised the argument in his reply brief with absolutely no citation to any authority, or any analysis to show why he should not have been tried under this theory. (*People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.) Stripped of its rhetoric, Baldwin's arguments require us to apply the law to the facts of this case to determine whether any reasonable jury could find him criminally liable for Mercer's death.

"[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman* (1996) 14 Cal.4th 248, 261 (*Prettyman*).) To apply the "'natural and probable

consequences'" doctrine to aiders and abettors, "[t]he jury must decide whether the defendant (1) with knowledge of the [perpetrator's] unlawful purpose, and (2) with the intent of committing, encouraging, or facilitating the commission of any target crime(s), (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); whether (4) the [perpetrator] committed an offense *other than* the target crime(s); and whether (5) the offense committed by the [perpetrator] was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated." (*Id.* at p. 267.)

The natural and probable consequences doctrine is based upon the rationale that aiders and abettors should be responsible for the criminal conduct they have naturally, probably, and foreseeably put into motion. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) To trigger application of the doctrine, "there must be a close connection between the target crime aided and abetted and the offense actually committed." (*Prettyman, supra,* 14 Cal.4th at p. 269.) The jury need not unanimously agree on the target crime. (*Id*. at pp. 267-268.) Whether the act committed was the natural and probable consequence of the act encouraged is a question of fact for the jury. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499.) The jury makes its determination based on the particular facts of the case. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)

Here, the trial court instructed the jury that the target crimes were public fighting in violation of Penal Code section 415, or brandishing a firearm in violation of section 417. Section 415 is violated if any person unlawfully fights in a public place, or

challenges another person in a public place to fight. (§ 415(1); see CALCRIM No. 2688.) To the extent Baldwin argues that, as a matter of law, no person can ever be found liable for a death where the target crimes are public fighting or brandishing a firearm because these offenses are "trivial," we reject it. Numerous courts have upheld convictions for murder as the natural and probable consequence of brandishing a firearm. (See e.g., *People v. Nieto Benitez* (1992) 4 Cal.4th 107-108; *People v. Lucas* (1997) 55 Cal.App.4th 721, 731-733; *People v. Solis* (1993) 20 Cal.App.4th 264, 272, disapproved on another ground in *Prettyman, supra,* 14 Cal.4th at p. 268, fn. 7.) Individuals have also been found guilty of murder for aiding and abetting public fighting. (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1055 [gang confrontation].)

Turning to the sufficiency of the evidence, Baldwin asserts there is no evidence showing an agreement to fight. The People, however, were not required to show "an agreement" to prove aiding and abetting. Rather, the prosecution needed to show that Baldwin had "knowledge" of the criminal purpose of the actual perpetrator, that he had "intent of committing" the target offense, and that he "instigated the commission of the target crime(s)." (*Prettyman, supra,* 14 Cal.4th at p. 267.) As a preliminary matter, we acknowledge that there is absolutely no direct evidence showing that Baldwin had knowledge of Little's criminal purpose as it appears undisputed that he never spoke to Little. Additionally, Baldwin and Cooper denied a plan to meet at the park to fight. The jury, as instructed, could have rejected this self-serving testimony and focused on the circumstantial evidence. (See CALCRIM No. 105.) Given the circumstantial evidence, a

reasonable jury could infer Baldwin's knowledge that he went to the park to fight Cooper, and any individuals who accompanied Cooper.

McFrasier, Baldwin's friend, threatened Cooper with a gun after the race. Nenejian described Little as being "mad and angry" because they had been chased by "Black people." Cooper testified that he was upset and angry about what had happened. Starting at 3:07 a.m., Baldwin spoke to Cooper for 3 minutes and 28 seconds about paying the bet. Baldwin again spoke to Cooper for 44 seconds at 3:11 a.m., but could not remember what they discussed. At 3:26 a.m., Cooper called Baldwin for the first time. Baldwin could not remember what was discussed in this call, or in a later call that Cooper made. Between 3:40 and 3:50, Cooper called Baldwin four times and the men spoke for over four minutes, but Baldwin could not remember what they discussed. Little was Cooper's friend and the evidence suggests that Little was in the car with Cooper during Cooper's conversations with Baldwin.

The jury could reasonably infer, based on Cooper and Little's anger toward Baldwin and McFrasier after the race, and the length of time that Cooper and Baldwin spoke, that the men did not have a cordial conversation regarding where to meet to exchange money; rather, that they planned a fight. These inferences are also supported by the actions the men took before the meeting. Cooper switched cars, and armed himself and Little. Baldwin also switched cars and recruited two friends that were not at the race; each man had a firearm. Baldwin did not tell Cooper what car he would drive to the park because he was concerned that Cooper would seek retaliation for what had happened at the park.

Other trial testimony also supported these inferences. Cooper testified that he thought a fight might occur at the park and Baldwin might bring guns and backup. Baldwin told a detective investigating the shooting that he did not trust Cooper, and he brought Dosty and Mercer to the park in case there was trouble. Baldwin stated Cooper had "talk[ed] shit" meaning that Cooper had insulted and challenged Baldwin. Baldwin also told the detective that he had received an anonymous telephone call warning him that the "white guys" had guns.

At trial, however, Baldwin denied telling the police that Cooper had talked "shit" to him. Nonetheless, he testified that he was concerned about Cooper's statement that they could "'deal with it on the street.'" Baldwin admitted that he became afraid after hearing that statement because he considered it a threat. Baldwin believed the meeting could be dangerous because of the foggy conditions and the way Cooper had spoken to him.

The jury could infer from the time and location of the meeting that the men wanted a deserted location where they could resolve their differences. The men could have met in a public place, or later in the day if their actual intent was to exchange money and not fight. Rather, they agreed to meet at an empty park during early morning hours in foggy conditions. When Cooper and Little got to the park, they essentially hid even though it was an extremely foggy night. Gunfire erupted shortly after Baldwin's arrival. Although Baldwin characterized the incident as a "drive-by shooting" by Cooper and Little, the issue of who fired first was a factual question for the jury to decide.

The next questions are whether a reasonable jury could conclude that Baldwin intended to commit, encourage, or facilitate the commission of the target crime, whether he aided, promoted, encouraged, or instigated the commission of the target crime, whether the perpetrator committed an offense other than the target crime, and whether the offense committed by the perpetrator was a natural and probable consequence of the target crime that the defendant encouraged or facilitated. (*Prettyman*, *supra*, 14 Cal.4th at p. 267.)

Based on the above evidence, the jury could reasonably conclude that Baldwin "intended to commit" the crime of fighting in public because Cooper challenged him, he agreed to meet Cooper, he knew the "white guys" would have guns, and he brought guns and backup for the meeting. The jury could also have concluded that Baldwin "instigated the commission of the target crimes" by firing first. Little clearly committed an offense other than public fighting, the first degree murder of Mercer. Finally, the jury could reasonably conclude that the murder Little committed was a "natural and probable consequence" of the target crime of public fighting that Baldwin aided and abetted.

Baldwin's arguments that he never spoke to Little, did not "intend" to harm his friend, did not intend to aid Cooper and Little's attack on Mercer, or facilitate an assault on himself are red herrings. The primary issue for aiding and abetting liability is whether Baldwin had knowledge of Cooper and Little's unlawful purpose to engage in a public fight. Viewing the evidence in the light most favorable to the judgment, a jury could reasonably infer that Baldwin had knowledge of Cooper and Little's unlawful purpose to engage in a public fight. Accordingly, we conclude the evidence supported Baldwin's

voluntary manslaughter conviction on the theory that he aided and abetted Little in the target offense of public fighting which, under the natural and probable consequences doctrine, resulted in Mercer's death.

D. Baldwin's Personal Use of a Firearm

In connection with the murder charge in count 1, the district attorney alleged that Baldwin personally and intentionally discharged a firearm within the meaning of sections 12022.53, subdivision (c), and 1192.7, subdivision (c)(8). The jury found the allegation true. Based on this finding, the trial court enhanced Baldwin's voluntary manslaughter conviction by a sentence of four years under section 12022.5, subdivision (a).

Whether a defendant used a firearm in the commission of an enumerated offense is for the trier of fact to decide. (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) We review the sufficiency of the evidence to support an enhancement using the same standard we apply for conviction of the substantive offense. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) (*Ante*, Part II.A.)

Baldwin asserts his four-year sentence must be stricken because he did not personally use a firearm during the commission of the voluntary manslaughter. We conclude sufficient evidence supported the enhancement.

The punishment for any person "who personally uses a firearm in the commission of a felony" shall be enhanced "by an additional consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense." (§ 12022.5, subd. (a).) "A firearm use enhancement attaches to an offense, regardless of its nature, if the firearm use aids the defendant in completing one of its essential elements."

(*People v. Masbruch, supra,* 13 Cal.4th at p. 1012.) "The intent of the Legislature in enacting the firearm use enhancement . . . was 'to deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use.'" (*People v. Fierro* (1991) 1 Cal.4th 173, 225-226, disapproved on a different point in *People v. Letner and Tobin* (2010) 50 Cal.4th 99.) The "legislative intent to deter the use of [weapons] in the commission of [crimes] requires that 'uses' be broadly construed." (*People v. Chambers* (1972) 7 Cal.3d 666, 672.) "By merely bringing a gun 'into play,' the defendant removes impediments to its actual discharge and thus enhances the danger of violent injury not only through an intentional act by the victim or a third party, but through an impulsive or inadvertent act by the defendant." (*People v. Granado* (1996) 49 Cal.App.4th 317, 327.)

When there are multiple defendants who are each armed and engaged in the same criminal enterprise, a defendant who personally uses a weapon during one segment of a series of related offenses is properly subjected to weapon use enhancements for those offenses he has merely aided and abetted. (*People v. Berry* (1993) 17 Cal.App.4th 332, 335-339 and cases cited therein.) Although Baldwin acknowledges this authority, he seeks to distinguish it by arguing that the firing of his weapon did not facilitate Mercer's killing.

In re Antonio R. (1990) 226 Cal.App.3d 476 is directly on point. There, the defendant fired into a crowd, eliciting return gunfire that killed his girlfriend. It was undisputed that the defendant did not fire the fatal shot. The appellate court affirmed his murder conviction with a firearm use enhancement, stating: "The obvious purpose of

section 12022.5 is to discourage the use of firearms in criminal activity. Had the Legislature meant to exclude from its provisions one who is only vicariously liable, it could easily have done so . . . . As we read the statute, one who commits an act which renders him criminally liable, whether directly or vicariously, is subject to the section 12022.5 enhancement if he personally uses a firearm during that act." (*Id.* at p. 479; accord, *In re Londale H.* (1992) 5 Cal.App.4th 1464, 1468.)

Here, the evidence established that Baldwin fired six or seven rounds from his weapon during the encounter at the park. As discussed above, a reasonable jury could have concluded that the men met at the park planning to fight. (*Ante*, Part II.C.) Although Baldwin did not fire the fatal shot, a reasonable jury could also have concluded that he fired the first shot after seeing headlights suddenly turn on, and that his use of a firearm caused Cooper and Little to return fire as they left the park. Thus, Baldwin's use of his firearm increased the danger to all participants and made application of the firearm enhancement proper.

Baldwin's reliance on *People v. Walker* (1976) 18 Cal.3d 232 for the proposition there is no derivative liability for a firearm enhancement is misplaced. In that case, there was no evidence that the aider and abettor defendant actually handled a firearm at all while the perpetrator shot someone (*id*. at pp. 236-237), and the trial court erroneously instructed the jury "that it need not be proved that the defendant physically used the gun so long as the jury was satisfied that someone during the perpetration of the offense did use the weapon. . . ." (*Id.* at p. 243.) "*Walker* left intact the holding in [*People v*.] *Johnson* [(1974) 38 Cal.App.3d 1] that a defendant who personally uses a firearm in a

series of joint offenses may be found to have personally used a firearm in a shooting though he did not fire the actual shot." (*People v. Berry*, *supra*, 17 Cal.App.4th at pp. 336-337.)

We therefore hold sufficient evidence supported the gun use finding against Baldwin.

III. *Alleged Instructional Errors*

A. The Mutual Combat and Contrived Self-Defense Instructions

The trial court gave instructions on self-defense including CALCRIM Nos. 3470, 3471 and 3472. These instructions address when a defendant may lawfully use force in self-defense (CALCRIM No. 3470), circumstances when self-defense is available to an aggressor or mutual combatant (CALCRIM No. 3471), and that a plea of self-defense may not be contrived (CALCRIM No. 3472). CALCRIM No. 3471 instructs there is no right of self-defense under certain circumstances if "[a] person who engages in mutual combat." Neither it nor any other instruction defined the term "mutual combat," and the jury was instructed that "[w]ords and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings." (CALCRIM No. 200.) Similarly, CALCRIM No. 3472 instructs there is no right of self-defense for a defendant who "provokes a fight or quarrel with the intent to create an excuse to use force."

Baldwin objected to CALCRIM No. 3472 on the ground the evidence did not support giving an instruction on contrived self-defense. The trial court overruled his objection. The parties did not object to CALCRIM No. 3471, nor did they make any request for the court to further define any of the terms in the instruction. However,

during the discussion with the court on CALCRIM No. 3472, Baldwin's counsel argued there was no evidence of a preexisting agreement to engage in mutual combat. The prosecutor disagreed with this assertion.

1. Alleged Inapplicable Instructions

Baldwin argues that the trial court erred in giving CALCRIM Nos. 3471 and 3472 because the evidence did not warrant these instructions. Baldwin asserts that his contentions are cognizable on appeal because his counsel objected to the court's decision to give these instructions. To the extent he may be barred from claiming these errors on appeal, he asserts that he received ineffective assistance of counsel. We address his contentions on their merits to determine whether there was an impairment of his substantial rights or ineffective assistance of counsel. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

A trial court "'should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.'" (*People v. Flannel* (1979) 25 Cal.3d 668, 685, overruled on other grounds in *In re Christian S.* (1994) 7 Cal.4th 768, 777.) "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Such error is one of state law subject to the traditional *Watson* test, which requires reversal if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred. (*Id.* at p. 1130; *People v. Watson* (1956) 46 Cal.2d 818, 836.) To determine whether there was prejudice, we examine the entire record,

including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. (*Guiton*, *supra*, at p. 1130.)

Here, the trial court gave a series of standard jury instructions on self-defense. The instructions did not target a particular defendant. It also instructed the jury that some instructions might not apply and that it should follow only those instructions that applied to the facts as the jury found them. (CALCRIM No. 200.) The mutual combat instruction informed the jury that, if Baldwin engaged in mutual conduct or was the first to use physical force, he had no right of self-defense unless he: (1) actually and in good faith tried to stop fighting; (2) made his opponent aware that he wanted to stop fighting and that he had stopped fighting; and (3) gave his opponent a chance to stop fighting. (CALCRIM No. 3471.)

The appellate court in *People v. Ross* (2007) 155 Cal.App.4th 1033 (*Ross*) addressed the concept of mutual combat as the term applied to the right of self-defense. In *Ross*, the defendant and a woman "engaged in a hostile verbal exchange, at the culmination of which she slapped him. Defendant responded with a blow that fractured her cheekbone." (*Id.* at p. 1036.) Defendant was convicted of aggravated assault and battery after the trial court: (1) instructed the jury, over defense objection, that a person charged with assault cannot successfully plead self-defense if he was engaged in mutual combat with the alleged victim; and (2) also refused the deliberating jurors' request for a legal definition of "mutual combat," telling them instead to rely on the ordinary meaning of those words. (*Id*. at pp. 1036, 1042-1043) The *Ross* court found "'mutual combat' consists of fighting by mutual intention or consent, as most clearly reflected in an express

or implied *agreement* to fight." (*Id.* at pp. 1046-1047.) Thus, the mutual combat instruction is inapplicable unless there is evidence from which "the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose*." (*Id.* at p. 1047.)

Although the court found error in giving the mutual combat instruction absent substantial evidence, it was the trial court's failure to clarify the definition of "mutual combat" on inquiry by the jury that was determined to be prejudicial error. (*Ross, supra*, 155 Cal.App.4th at pp. 1049, 1054-1056.) The court reasoned: "Had the jury been properly instructed on the meaning of 'mutual combat,' and were the record otherwise silent on the subject, [the instruction might be harmless]. A properly instructed jury would not find 'mutual combat' on the present facts, and would therefore presumably ignore the instruction. But the jury here was *not* properly instructed. It was left to suppose that the instruction might apply to *any* exchange of blows." (*Id*. at p. 1056.)

Questions related to the right of self-defense, including whether the defendant acted in self-defense, or whether the defendant provoked a quarrel with the intention of creating a need for self-defense are normally factual questions to be decided by the trier of fact. (*People v. Clark* (1982) 130 Cal.App.3d 371, 378, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.) Here, unlike the instruction at issue in *Ross* which dealt solely with the right to self-defense of a person engaged in mutual combat (*Ross, supra*, 155 Cal.App.4th at p. 1042, fn. 9), CALCRIM No. 3471 applies to both mutual combatants and initial aggressors. Thus, the trial court properly gave the instruction as the jury could have reasonably concluded that either Baldwin or

Cooper was the initial aggressor at the park and therefore not entitled to claim self-defense unless the person had: (1) actually and in good faith tried to stop fighting; (2) made his opponent aware that he wanted to stop fighting; and (3) made his opponent aware he had stopped fighting. (CALCRIM No. 3471.)

Additionally, as we discussed in detail above, there was sufficient evidence from which the jury could reasonably conclude the men knew they were meeting at the park to fight. (*Ante*, Part II.C.) Accordingly, the trial court properly instructed the jury with CALCRIM No. 3471.

CALCRIM No. 3472 instructed the jury that: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Following McFrasier's armed confrontation of Cooper after the race, Baldwin and Cooper exchanged multiple calls. Thereafter, they both switched their vehicles, armed themselves and brought other individuals with them to a deserted park. From this evidence, a reasonable jury could infer that either Baldwin or Cooper provoked a quarrel with the intent of creating an excuse to use force.

Even if CALCRIM No. 3472 were not supported by the evidence, we would find any error in giving the instruction to be harmless. An instruction correctly stating a principle of law but not applicable to the facts of the case is usually harmless, having little or no effect "other than to add to the bulk of the charge." (*People v. Sanchez* (1947) 30 Cal.2d 560, 573.) The jury presumably disregarded a legally correct but irrelevant instruction, and there is no reasonable probability the verdict would have been more favorable to Baldwin had this instruction been omitted. (*People v. Olguin, supra*, 31

Cal.App.4th at p. 1381 [harmless error in giving correct but irrelevant instruction on contrived self-defense].)

2. Failure to Define "Mutual Combat"

Assuming the trial court properly gave CALCRIM No. 3471, Baldwin and Cooper rely on *Ross* to assert the trial court committed prejudicial error by failing to instruct the jury that "mutual combat" requires a prior express or implied agreement to fight. (*Ross, supra,* 155 Cal.App.4th at pp. 1046-1047.) Specifically, they assert the trial court had a sua sponte duty to define "mutual combat" beyond the language of the jury instruction because the term has a technical meaning peculiar to the law, and narrower than the popular understanding of the term. We disagree that the trial court had a sua sponte duty to define the term, and conclude that it is not reasonably likely that the jury was misled by the instruction such that Baldwin and Cooper's rights were violated.

Although the *Ross* court addressed, in great length, the meaning of the term "mutual combat" in the self-defense context, it did not conclude there existed a sua sponte duty to define this term in the absence of a request from counsel, a request from the jury, or some demonstrated need for clarification. (See *Ross, supra,* 155 Cal.App.4th at pp. 1047-1048.) Counsel has not cited, nor have we located any decision finding the existence of a sua sponte duty to define this term. Accordingly, without a request to define mutual combat from counsel, or any expressed confusion about the meaning of the term by the jury, the trial court had no duty to further amplify the instruction on its own motion. (See *People v. Parson* (2008) 44 Cal.4th 332, 352; *People v. Miceli* (1951) 101 Cal.App.2d 643, 649.)

Significantly, the *Ross* court did not find "mutual" to be a technical term; rather, it found the word could be ambiguous because "[t]he mutuality triggering the doctrine inheres not in the combat but in the preexisting intent to engage in it. Old but intact case law confirms that as used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities." (*Ross*, *supra*, 155 Cal.App.4th at pp. 1044-1045, italics omitted.) In response to *Ross*, the CALCRIM instructions now permit the trial court to instruct, when the facts justify it, that "[a] fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose." (CALCRIM No. 3471.)

"The fact a word has more than one meaning, some of which are arguably contradictory, does not, without more, mean it is not a commonly understood term and therefore must be defined for the jury." (*People v. Forbes* (1996) 42 Cal.App.4th 599, 606.) Ordinarily, a failure to request clarifying language to an instruction that is a correct statement of the law bars appellate review of the issue. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) Nonetheless, we may "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim -- at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994), 26

Cal.App.4th 1241, 1249.) Because Baldwin contends that the instruction was incomplete and that any error affected his substantial rights, we assume his claim of error was not forfeited and address the merits. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

In assessing a claim of instructional error or ambiguity, we must determine whether the defendant has demonstrated a reasonable likelihood the jury was misled in the manner suggested. (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) "We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions." (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.) Unless there is a reasonable likelihood the jury misunderstood the challenged instruction, we must uphold the court's charge to the jury. (*People v. Cross*, *supra*, 45 Cal.4th at pp. 67-68.) Moreover, a potential ambiguity in the instructions does not require reversal if the prosecution's argument made clear to the jury what the correct reading of the instructions was, as applied to the evidence. (See *People v. Kelly* (1992) 1 Cal.4th 495, 526; *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1321-1322.)

Significantly, unlike *Ross*, substantial evidence supported a reasonable inference that Baldwin and Cooper tacitly or impliedly knew they were meeting to fight each other, and the jurors here expressed no confusion over the term. (*Ante*, Part II.C.) Moreover, during closing argument, none of the attorneys incorrectly defined the meaning of mutual combat. Rather, to establish Baldwin's status as an aider and abettor, the prosecutor argued that Baldwin entered into an agreement to fight Cooper at the park. Furthermore, Baldwin's defense counsel correctly asserted that a mutual combatant loses the right to

claim self-defense, then argued to the jury that the evidence did not establish an agreement to fight. Counsel later argued to the jury that the self-defense instruction addressing "mutual combat or agreement to fight situation" did not apply. Taking the instruction as a whole, and considering the arguments of the parties, we see no reasonable likelihood jurors interpreted the instruction to apply to a mere exchange of gunfire without a preexisting agreement to fight.

B. Baldwin's Personal Use of a Firearm

For the murder charge in count 1, the district attorney alleged Baldwin personally and intentionally discharged a firearm within the meaning of sections 12022.53, subdivision (c), and 1192.7, subdivision (c)(8). The court instructed the jury with: CALCRIM No. 3146 [Personally Used Firearm (§§ 667.5, subd. (c)(8), 667.61, subd. (e)(4), 1203.06, 1192.7, subd. (c)(8), 12022.3, 12022.5, 12022.53, subd. (b))]; CALCRIM No. 3148 [Personally Used Firearm: Intentional Discharge (§ 12022.53, subd. (c))]; and CALCRIM No. 3149 [Personally Used Firearm: Intentional Discharge Causing Injury Or Death (§§ 667.61, subd. (e)(3), 12022.53, subd. (d))]. These instructions, however, referred only to defendants Cooper and Little.

On June 30, 2008, the jury indicated it had reached a verdict. The trial court, however, discovered a discrepancy in the verdict forms, excused the jury, and conferred with the parties. To resolve the issue, the trial court and parties agreed to provide a flow chart to assist the jury in completing new verdict forms. The flow chart listed the various findings the jury could make as to each defendant on all counts. For Baldwin on count 1, the chart asked the jurors to determine whether Baldwin was guilty of first degree

murder, second degree murder, or voluntary manslaughter. Upon determining Baldwin's guilt on the charge, the chart asked the jury to determine the related gun allegation. Specifically, if the jury found Baldwin guilty of voluntary manslaughter, it was required to determine whether the "gun allegation (12022.5)" was true.

The jury later sent out a note requesting clarification of the gun use finding in connection with second degree murder. The parties agreed upon the trial court's proposed response and it was provided to the jury. Shortly thereafter, the jury indicated it had reached its verdict. The jury convicted Baldwin of the lesser included offense of voluntary manslaughter in count 1. It also found as true the allegation that Baldwin personally and intentionally discharged a firearm.

Baldwin contends that the four-year enhancement of his voluntary manslaughter conviction under section 12022.5, subdivision (a) must be stricken because the jury was not instructed on all the elements of the enhancement as it applied to him. Although Baldwin conceded that he fired his weapon at the park, he asserts that the jury likely erroneously imposed the "personal use" enhancement under an aiding and abetting theory.

The trial court must instruct even without request on all of the elements of a charged offense (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311), and all "'elements' of an 'enhancement.'" (*People v. Clark* (1997) 55 Cal.App.4th 709, 714-715.) The trial court's failure to instruct the jury on the elements of an enhancement implicates federal constitutional issues and such error is reversible unless it can be shown "'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*People v.*

Sengpadychith (2001) 26 Cal.4th 316, 326, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Review of the adequacy of instructions is based on whether the trial court "fully and fairly instructed on the applicable law." (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558.) If possible, we interpret the instructions to support the judgment rather than to defeat it. (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

Here, the trial court correctly instructed the jury on the various firearm enhancements alleged. However, the instructions pertaining to the personal use of a firearm mentioned only Cooper and Little, and erroneously failed to mention Baldwin. Despite this omission, the jury expressed no confusion in resolving the firearm allegation as to Baldwin. We reject Baldwin's argument that the jury likely found him liable on the firearm enhancement based upon an aider and abettor theory of liability.

The verdict form specifically asked the jury whether Baldwin had "personally and intentionally discharge[d] a firearm." Baldwin admitted that he fired his weapon at the park. Given this admission it is not reasonably likely that the jury found Baldwin liable on the firearm allegation under a vicarious liability theory. Baldwin's contention that the jury relied on an aiding and abetting theory to find him liable for "personally and intentionally discharg[ing] a firearm" also conflicts with the plain language of the allegation that Baldwin "personally" discharged a firearm. Accordingly, we find the trial court's failure to include Baldwin's name in the instructions on the firearm use allegations harmless beyond a reasonable doubt.

IV. *Sentencing Claims*

A. Alleged Violation of Section 654

1. Legal Principles

Section 654 prohibits the imposition of multiple sentences where a single act or course of conduct pursuant to a single objective violates more than one statute. In such a situation, a defendant may be punished for only the more serious offense. (*People v. Diaz* (1967) 66 Cal.2d 801, 806.) However, if the evidence discloses that a defendant entertained multiple criminal objectives independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.) The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Whether the defendant held multiple criminal objectives is a question of fact for the trial court, and its finding will be upheld on appeal if there is any substantial evidence to support it. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

2. Count 3 - Cooper and Little

The jury found Cooper and Little guilty of unlawfully discharging a firearm at an occupied vehicle as alleged in count 3. It found Cooper guilty of Mercer's murder in count 1, and guilty of the attempted voluntary manslaughter of Baldwin as alleged in count 2. It found Little guilty of Mercer's murder, but not guilty of attempting to kill

Baldwin as alleged in count 2. The court sentenced Cooper on counts 1 and 2, sentenced Little on count 1, and imposed on both defendants a concurrent five-year term on count 3.

Cooper asserts that the imposition of the concurrent five-year term on the discharge of a firearm at an occupied motor vehicle conviction in count 3 violated the proscription against double punishment set forth in section 654 because count 3 was incidental and inseparable from count 1, the murder of Mercer, and count 2, the attempted murder of Baldwin. Little similarly contends that count 3 was incidental and inseparable from count 1, and that his sentence on count 3 should have been stayed.

The Attorney General asserts that the trial court properly imposed the sentence on count 3 in addition to the sentences on counts 1 and 2 because Cooper and Little pursued different objectives when they fired upon the different vehicles. Namely, they fired upon Baldwin's vehicle to satisfy the agreement to fight, but fired upon Mercer's vehicle seeking to escape the fight. We reject this assertion as it "parses the objectives too finely." (*People v. Britt* (2004) 32 Cal.4th 944, 953; *People v. Lopez* (2004) 119 Cal.App.4th 132, 138 [holding that section 654 precluded separate punishments for unlawful possession of ammunition and unlawful possession of a firearm where evidence showed single intent "to possess a loaded firearm"].)

During sentencing, the trial court did not expressly consider whether Cooper and Little harbored separate criminal objectives for shooting at the different vehicles, other than the obvious distinction that the vehicles contained different victims. Even assuming the trial court had the theory advanced by the People in mind when it refused to stay the sentences on count 3, substantial evidence does not support the sentencing court's implied

finding that either defendant formulated a separate criminal intent in the seconds it took to fire upon the two vehicles. Although the People characterize escaping from the fight as a separate objective, that act was not a criminal objective, but a motive behind Cooper's actions. While the motivation behind Cooper's commission of the crimes charged in counts 1 and 2 may have been different, he had a single criminal objective when he fired his weapon – to kill the occupants of the two vehicles. Motive is different from intent, and is not an element of a crime. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126.)

Cooper's act of firing upon the occupied vehicles was the means of accomplishing his main objective to kill the occupants of the two vehicles. Where the commission of one offense is merely "'a means toward the objective of the commission of the other,'" section 654 prohibits separate punishments for the two offenses. (*People v. Britt*, *supra*, 32 Cal.4th at p. 953.) Thus, because the trial court sentenced Cooper on counts 1 and 2, it should have stayed the sentence on count 3 (the less serious crime). (§ 654.) The analysis is the same for Little and count 1. Because the trial court sentenced Little on count 1, it should have stayed the sentence on count 3.

2. Count 5 - Baldwin

Baldwin received a six-year state prison term on count 1 for voluntary manslaughter, plus four years for the attendant firearm enhancement. On count 5, misdemeanor public fighting, the court sentenced Baldwin to a concurrent term of 90 days in county jail but stayed the sentence under section 654. However, the court minutes and the abstract of judgment do not reflect the stay.

Baldwin contends that his guilt for voluntary manslaughter relied upon this offense being a "natural and probable consequence" of his intent to disturb the peace. Accordingly, the trial court could not impose separate sentences for both the target offense (public fighting) and the non-target offense (voluntary manslaughter). Citing the court minutes, Baldwin asserts that the trial court erred by failing to stay his sentence on count 5. The Attorney General does not dispute that Baldwin's sentence on count 5 is properly stayed under section 645; rather, he asserts the issue is moot based on the court's oral pronouncement.

"Any discrepancy between the minutes and the oral pronouncement of a sentence is presumed to be the result of clerical error." (*People v. Price* (2004) 120 Cal.App.4th 224, 242.) Clerical errors may be corrected by this court on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, we order the minute order and abstract of judgment be corrected to reflect that the concurrent 90-day sentence on count 5 be stayed under section 654.

B. Cooper's Sentence Enhancement

During the commission of count 1, the jury found it true that Cooper had personally discharged a firearm within the meaning of subdivision (c) of section 12022.53 (section 12022.53(c)). The sentence for the enhancement is 20 years. (§ 12022.53(c).) However, in pronouncing the sentence on the enhancement, the trial court erroneously stated, "As to the enhancement pursuant to [section 12022.53(c)], the full upper [term] of 20 years *to life* . . . ." (Italics added.) The minutes reflect the erroneous

oral pronouncement, but the abstract of judgment reflects the correct, determinate, 20-year, enhancement term.

As a general rule, the oral pronouncements of a trial court are presumed correct (*People v. Mesa* (1975) 14 Cal.3d 466, 471, superseded by statute on other grounds as explained in *People v. Turner* (1998) 67 Cal.App.4th 1258, 1268; *People v. Thompson* (2009) 180 Cal.App.4th 974, 978); however, under certain circumstances a minute order or abstract of judgment will prevail over a reporter's transcript. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 768; *People v. Thompson*, *supra*, 180 Cal.App.4th at p. 978.) We will order that the minute order be corrected to properly reflect Cooper's sentence on the enhancement as a determinate term of 20 years.

C. Presentence Custody Credit

Cooper and Little contend, the Attorney General concedes, and we agree that the trial court erred when it failed to award them credit for the actual time they spent in custody. A defendant shall receive credit for all days served in custody, including both the day of arrest and the day of sentencing. (§ 2900.5; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412.)

Here, Cooper is entitled to presentence custody credit of 524 days based on his arrest date of March 14, 2007, and his sentencing date of August 18, 2008. Little is entitled to 523 days of presentence custody credit based on his March 15, 2007, arrest date and his August 18, 2008, sentencing date.

DISPOSITION

The superior court is directed to correct the minute order dated August 18, 2008, to reflect that Cooper's sentence on the Penal Code section 12022.53, subdivision (c) enhancement attached to count 1 is a determinate term of 20 years. The superior court is directed to correct the minute order dated August 18, 2008, and the abstract of judgment to reflect that Baldwin's concurrent 90-day term in county jail on count 5 is stayed under Penal Code section 654. The five year consecutive term imposed for Cooper and Little's conviction on count 3 is ordered stayed under Penal Code section 654. Cooper is to receive 524 days of presentence custody credit. Little is to receive 523 days of presentence custody credit.

The superior court is ordered to prepare amended abstracts of judgment showing these modifications and send them to the Department of Corrections. As so modified, Cooper's, Little's and Baldwin's judgments are affirmed.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.